SERVED: September 27, 1993

NTSB Order No. EA-3985

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 22nd day of September, 1993

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. THOMAS L. HAGAN, Respondent.	Docket SE-11757

OPINION AND ORDER

Respondent has appealed from the written decision of Administrative Law Judge Jerrell R. Davis, issued on February 3, 1992.[1] The law judge granted the Administrator's motion for summary judgment, thus affirming an order of the Administrator

[1]The law judge's decision is attached. Although respondent seeks an "appeal hearing," none is necessary. We typically decide appeals from the law judge's decision on the written record, with argument before the Board Members reserved for extraordinary cases.

revoking respondent's pilot and mechanic certificates for violation of 14 C.F.R. 61.15, 65.12, and 91.12.[2] We deny the appeal.

In 1989, respondent pleaded guilty and was convicted of conspiracy to import marijuana and cocaine in violation of 21 U.S.C. 952 and 963. On the basis of that conviction and respondent's role in the conspiracy, the Administrator sought to revoke his certificates. In support of his motion for summary judgment, the Administrator introduced an affidavit from a DEA Special Agent, Harry Kaczmarek, who was involved in the criminal

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[2] § 61.15, as relevant, provides:

> (a) A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs or substances is grounds for--
>
> (2) Suspension or revocation of any certificate or rating issued under this part.

§ 65.12 provides, as pertinent:

> (a) A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs or substances is grounds for--
> * * * * *
> (2) Suspension or revocation of any certificate or rating issued under this part.

§ 91.12 (now 91.19) reads, as relevant:

> (a) except as provided in paragraph (b), no person may operate a civil aircraft within the United States with knowledge that narcotic drugs, marihuana, and depressant or stimulant drugs or substances as defined in Federal or State statutes are carried in the aircraft.

proceedings. The affidavit described respondent's participation in a smuggling operation and indicated, among other things, that respondent was the "principle [sic] smuggling pilot" for a number of years, and that respondent had obtained a sea plane rating in furtherance of the drug smuggling operation.

Respondent argued that the conspiracy charge made no mention of use of an aircraft and questioned the reliability of Mr. Kaczmarek's affidavit. But, as the law judge noted, respondent did not deny the substance of the agent's statements. Respondent also argued: that the conspiracy charge raised no qualification issue, so as to warrant revocation; that the Administrator's complaint was stale and should be dismissed pursuant to 49 C.F.R. 821.33; that the U.S. Attorney had granted him immunity from further prosecution, and he interpreted this to include FAA certificate action; and that his more recent behavior shows he has the qualifications to hold his certificates. Respondent raises these same arguments on appeal, and also now appears to argue that the FAA reneged on an agreement with him.[3]

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[3]The Administrator moves to strike that part of respondent's appeal that discusses the informal conference process and his perception of its results. According to respondent, FAA counsel said he would recommend a lesser sanction but then, inexplicably, reneged on that promise.

This material is not proper matter for appeal. In effect, respondent is testifying, and this issue was not raised before the law judge. In any case, respondent's argument would not warrant reversal of the law judge's decision. Irrespective of whether counsel's behavior was appropriate, the fact remains that, even according to respondent's statement, counsel agreed only to recommend a lesser sanction. Respondent had no binding agreement from the FAA that revocation would not be sought.

We agree with the law judge's resolution, and need add little to his analysis of the issues before us here. It was not improper for the law judge to use Mr. Kaczmarek's affidavit to establish the connection between the conspiracy conviction and use of an aircraft. That matter was not obvious in the court documents, and thus required development via some other means, such as were used here. When respondent did not challenge the truth of key facts, the law judge had no issue of fact before him that warranted an evidentiary hearing.[4]

As to the more basic question of whether a grant of immunity precluded either the prosecution itself or use of the affidavit, we need look no farther than respondent's appeal for the answer. His statements belie the contention that the U.S. Attorney offered immunity from FAA prosecution.[5] Respondent offers no written plea agreement or other evidence to support his claim that he was immunized from all further, related prosecution. We have no basis, therefore, to find that any grant of immunity to respondent was violated, even were it binding on the FAA.

Having established that the conspiracy involved aircraft, the law judge also was correct in upholding the sanction of

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[4]To the extent the affidavit may contain hearsay, it is admissible in Board proceedings. Administrator v. Howell, 1 NTSB 943, 944 at note 10 (1970).

[5]Apparently, the Department of Justice offered to and did send a letter of some sort to the FAA. This is, it seems, not an uncommon approach. See Administrator v. Renner, NTSB Order EA-3927 (1993) at 5-6 (in return for respondent's cooperation in the criminal proceeding, U.S. Attorney sent letter to FAA recommending that no charges be brought).

revocation. Indeed, there is no requirement that respondent be directly involved with operation of the aircraft, or even that an aircraft be a part of the scheme (see 14 C.F.R. 61.15), for revocation to be warranted. See discussion in Administrator v. Hernandez, NTSB Order EA-3821 (1993). And, as we said there (at note 5):

> Respondent's assistance and support of the drug-running activity could easily be seen as an absence of the care, fitness and responsibility required of a . . . certificate holder and thereby demonstrate lack of qualification, the basic standard for revocation.

That respondent has increased his qualification does not outweigh the concern that his drug-related conviction demonstrates a lack of the care, judgment, and responsibility demanded of a certificate holder. See, e.g., Administrator v. Frost, NTSB Order EA-3856 (1993) at 7. The so-called "positive aspects" of respondent's case (Appeal at ¶ 11) do not support a different result. Administrator v. Stanberry, NTSB Order EA-3308 (1991) (where lack of qualification has been established, mitigating factors are not relevant).

Finally, we decline respondent's request that we dismiss the complaint as stale. Well-established precedent holds that we will not dismiss as stale cases where lack of qualification is legitimately in issue.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The revocation of respondent's airman and mechanic certificates shall begin 30 days from the date of service of this order.[6]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[6]For the purposes of this order, respondent must physically surrender his certificates to an appropriate representative of the FAA pursuant to FAR § 61.19(f).